No. 10-431

IN THE SUPREME COURT OF THE UNITED STATES

KYLE RAINEY,
Petitioner

v.

JEROME W. WALSH, SUPERINTENDENT, SCI-DALLAS; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner planned and directed a robbery-murder of a store owner. He was convicted of murder with specific intent to kill ("first degree murder" under Pennsylvania law) and received a mandatory life sentence when the jury failed to vote for a death sentence. On habeas review he claimed counsel ineffectiveness for failing to challenge the sufficiency of the evidence to prove specific intent to kill.

The court of appeals rejected the claim under the prejudice prong of the ineffective assistance analysis, because (as petitioner effectively conceded) he was guilty of felony murder ("second degree murder" under Pennsylvania law) even if the evidence had been insufficient to prove specific intent to kill. Absent the death penalty, Pennsylvania law makes no distinction between first and second degree murder: both carry a mandatory life term, which is what petitioner got.

The question presented is whether this Court should deny review where habeas relief is unavailable as a threshold matter because petitioner procedurally defaulted his ineffectiveness claim, where the state courts reasonably determined that counsel did not perform deficiently because the evidence was not insufficient, and where, in any case, the ground for decision relied on by the appeals court was both unremarkable and unlikely to have

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INTRODUCTION

Petitioner is a modern-day Fagan who stands properly convicted by a Philadelphia jury of first degree murder and related crimes for the robbery-murder of jeweler Sun Kang. Although Mr. Kang was shot by petitioner's juvenile confederate, the jury concluded that petitioner -- who was ten years older than the fifteen-year-old shooter -- was the mastermind of the crime and at least as culpable as the teenager. The jurors' verdicts also reflected their determination that petitioner was more culpable than the third co-defendant, adult Darrell Wallace, who was convicted only of second degree (felony) murder. These differing verdicts highlight the jury's conviction that petitioner shared the specific intent to kill Mr. Kang. In fact, the jury went even further, to the point of deadlocking on whether his culpability was so great as to warrant the imposition of the death penalty.

Petitioner presently seeks this Court's review of the decision by the Court of Appeals for the Third Circuit denying him federal habeas relief under 28 U.S.C. § 2254. He attacks the circuit court's conclusion that he was not entitled to the windfall of release from prison and total discharge on all counts of murder based on his allegation that counsel provided ineffective assistance by not challenging the sufficiency of the evidence of his specific intent to kill. The Third Circuit, recognizing that petitioner was plainly guilty of felony murder

whether or not he was also guilty of specific intent murder, disposed of the case on the prejudice prong of ineffective assistance analysis. Under Pennsylvania law, if (as here) a sentence of death is not imposed, the sentence for felony murder and specific intent murder is exactly the same: mandatory life imprisonment. The only difference is in name (second degree versus first degree), not in substance. Accordingly, the circuit court held that petitioner suffered no actual harm, because even if counsel had challenged specific intent, the state courts would have had no power to impose a different sentence. Since detention is the focus of the habeas inquiry and release its sole remedy, the extraordinary relief of the writ was thus inappropriate.

Review of this case would be inappropriate for several reasons independent of the Third Circuit's ground for decision. First, petitioner's ineffectiveness claim is procedurally defaulted, the circuit court's contrary conclusion notwithstanding. Second, although the Third Circuit did not have to reach the issue, the state courts reasonably held -- in a decision owed deference under the Antiterrorism and Effective Death Penalty Act (AEDPA) -- that direct appeal counsel did not perform deficiently for declining to litigate sufficiency, because ample circumstantial evidence proved petitioner's shared intent to kill.

Turning to the question proposed for review, multiple additional considerations make this case unsuitable for the grant of *certiorari*. Above all, petitioner has exaggerated the Third Circuit's decision to a rather remarkable degree, as the holding is obviously limited to the facts and unusual statutory scheme in this case. Nor is there a "circuit split," despite his efforts to create one. Rather, only one other circuit court has addressed even a remotely similar issue: the Fifth Circuit in *Clark v. Maggio*, 737 F.2d 471, 475 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985). In *Clark*, the prisoner's meritorious sufficiency challenge to the evidence of his specific intent to kill did not warrant overturning a state murder sentence because, under the uncommon circumstances also present in that case, he would not be entitled to release. *Clark* is thus is consistent with the Third Circuit's decision in this case. Here, however, petitioner faces in addition the significant burdens imposed by the AEDPA and *Strickland v. Washington*, 466 U.S. 668 (1984). This Court denied *certiorari* in *Clark*[1] and should likewise decline to review the defaulted, meritless, and unimportant issue presented in this case.

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[1]Petitioner's application for *certiorari* omits the procedural history of *Clark* reflecting this Court's determination that the denial of habeas relief in that case did not warrant review. (Petition at v, 10.)

COUNTERSTATEMENT OF THE CASE

Petitioner was an adult in his mid-twenties when he orchestrated the robbery-murder in this case, sending teenager Nathan Riley into Sun Kang's jewelry store to rob the jeweler and his wife Mahlee with a loaded gun.

The jury was entitled to infer from the evidence that petitioner was the gang's ringleader and that he gave the deadly weapon to the 15-year-old to use against the storekeepers. The evidence proved petitioner's extensive role in managing the robbery-murder, and thus that he was its mastermind, despite various claims to the contrary. Petitioner even oversaw the crime by acting as lookout, standing in the doorway as the teenager and an additional perpetrator[2] began the robbery, while the getaway driver (co-defendant Darrell Wallace) waited nearby in a car. Within seconds, as was plainly contemplated by the conspiracy, the teenager used the gun to shoot Mr. Kang. Ms. Kang begged petitioner to help her dying husband. But petitioner instead closed the door and left, leaving the Kangs trapped inside the store with the young shooter and the other robber. Petitioner then drove up with the getaway man, ordering his two cohorts

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[2]Maurice Everett, a/k/a "Geeter." Because Everett was still a fugitive at the time of trial, he was tried separately.

in the store to get in the car. After they fled, petitioner sold the jewelry and distributed the proceeds to his confederates. A search of his apartment produced a price tag from the store and ammunition of the same type as the bullet that killed Mr. Kang. Petitioner became a fugitive and evaded police in a car chase before being arrested.

The jury thus had ample basis to infer petitioner's shared intent to kill. The evidence made evident that petitioner expected his teenaged confederate to use fatal violence and enabled him to do so.[3]

Faced with a record that firmly established petitioner's guilt of first and second degree murder, trial and direct appeal counsel both sensibly decided as a strategic matter not to challenge to the sufficiency of the evidence of specific intent to kill, in favor of other claims that might be more likely to secure relief and that would apply as to all the charges.

Accordingly, trial counsel aggressively litigated several motions before, during, and after trial, focusing in particular on repeated demands for severance. Before trial, he filed a motion to

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[3]The trial record included testimony by Detective Albert Maahs about oral statements by co-defendant Riley, the teenager, which confirmed that petitioner "ran the show," including by giving Riley the murder weapon.

sever as well as to suppress the physical evidence, all statements and admissions, and any identifications. Counsel also moved to exclude specific reference to petitioner's nickname "Oliverman," or general reference to "Oliverman" or "Fagan," due to the character in "Oliver Twist" and "Oliver." Trial counsel continued to attack the prosecution's case throughout trial, making numerous objections and other motions. After trial, counsel's post-verdict motion once again focused on severance.

On direct appeal, new counsel raised the six issues he deemed most likely to prevail. These included the severance issue pressed by trial counsel and a challenge to the testimony by Detective Albert Maahs about Riley's oral statements that petitioner was the mastermind rather than the other perpetrators, as the teenager had asserted in his written statement and testimony. The Superior Court rejected petitioner's claims, finding that the trial court correctly denied severance and properly admitted Riley's statements for impeachment purposes, and that any error was harmless.[4]

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[4]Although petitioner did not raise a sufficiency challenge on appeal, the testimony by Detective Maahs would have been considered for purposes of sufficiency analysis even if he had. Once evidence is admitted, a defendant can seek a new trial on the ground that admission was erroneous; but he cannot "unring the bell" by seeking an absolute discharge on the ground that the evidence would have been

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Petitioner next filed a *pro se* petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq*. His petition and subsequent *pro se* appellate brief asserted that trial and appellate counsel were ineffective for not preserving and litigating, respectively, the claim that the first degree murder verdict was against the *weight* of the evidence. Pennsylvania law clearly distinguishes between challenges to the weight of the evidence and challenges to the sufficiency of the evidence. A weight challenge seeks a new trial before a different fact finder, on the ground that the evidence of guilt was so unpersuasive that the verdict shocks the conscience. A sufficiency challenge seeks an absolute discharge, precluding a new trial, on the ground that the evidence -- even if credited in its entirety and even if some of it should not have been admitted -- is legally inadequate to establish the elements of the offense. The state courts rejected petitioner's post-conviction weight of evidence challenge for lack of merit and also denied collateral relief as to his other claims. There was no sufficiency challenge.

Petitioner's federal habeas petition again alleged ineffectiveness for failure to litigate *weight*. The magistrate found counsel ineffective for not

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[4](...continued)
legally insufficient to convict if a particular piece of testimony had never been heard by the fact finder.

raising weight, but only by conflating weight with sufficiency. The district court and the Third Circuit, in turn, construed the petition as asserting a claim based on sufficiency. They construed his PCRA appeal brief similarly, even though the Superior Court had not done so, and even though petitioner's filings in state *and* federal court titled his claim "weight," applied the weight standard, and cited weight cases. Liberal construction of *pro se* pleadings was thus distorted to allow petitioner to ask the state court to decide a weight claim yet litigate in federal court the very different, irreconcilable issue of sufficiency.

Petitioner now seeks this Court's review of the Third Circuit's rejection of his ineffectiveness claim on the merits. Unlike the district court, the Third Circuit did not reach the underlying sufficiency issue, affirming instead the district court's conclusion that petitioner suffered no prejudice. He did not dispute his guilt of second degree murder, the court noted, and thus even if he lacked the specific intent to kill, he was still guilty of felony murder and thus subject to the same, life sentence mandated by Pennsylvania's particular statutory scheme. The windfall relief he seeks -- release and complete discharge on all charges -- was therefore nonsensical and inconsistent with fundamental habeas corpus law. Petitioner now demands the grant of *certiorari* despite his default, his ineligibility for relief under the highly deferential standards

that control, and the virtually unlitigated nature of the question presented.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW WHERE HABEAS RELIEF IS UNAVAILABLE AS A THRESHOLD MATTER BECAUSE PETITIONER PROCEDURALLY DEFAULTED HIS INEFFECTIVENESS CLAIM, WHERE THE STATE COURTS REASONABLY DETERMINED THAT COUNSEL DID NOT PERFORM DEFICIENTLY BECAUSE THE EVIDENCE WAS NOT INSUFFICIENT, AND WHERE THE GROUND FOR DECISION RELIED ON BY THE COURT OF APPEALS WAS BOTH UNREMARKABLE AND UNLIKELY TO HAVE SIGNIFICANT EFFECT IN LIGHT OF THE UNUSUAL CIRCUMSTANCES PRESENTED.

Review should be denied because petitioner is ineligible for federal habeas relief for multiple reasons. He failed to give the state courts the necessary opportunity to adjudicate his ineffectiveness claim in the first instance, and his default cannot be excused. To the extent his claim may be deemed fairly presented, the state courts' reasonable determination that counsel did not perform

deficiently is entitled to deference under Section 2254(d), further precluding relief. But even if the state court adjudication could somehow be deemed capricious for Section 2254(d) purposes, it was not unjust for the Third Circuit to deny the writ where there was no prejudice, in a decision that is necessarily limited to the rare combination of circumstances in this case.

A. Habeas Relief Is Unavailable for Reasons Independent of the Third Circuit's Ground for Decision.

This case is unsuitable for review because petitioner could not properly be awarded habeas relief even if this Court were to reverse the Third Circuit's ground for decision. This Court's resolution of the question presented is unnecessary and thus inappropriate.

1. Petitioner's Claim is Procedurally Defaulted.

Contrary to the Third Circuit's decision, petitioner did not fairly present to the state courts an ineffectiveness claim predicated on sufficiency. As the circuit court acknowledged, weight and sufficiency are distinct and mutually exclusive claims. Whereas a sufficiency claim concerns the quantum of the evidence, assuming its truth but challenging whether it proves the legal elements of the crime, a weight claim *concedes* sufficiency and contests the

credibility and weight accorded the evidence. *Commonwealth v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000). Because petitioner presented only a weight claim in state and federal court, the inimical claim of sufficiency is defaulted under this Court's precedent, and no grounds exist to excuse his default.

The only ineffectiveness claim fairly presented by petitioner in state court was that trial and direct appeal counsel were ineffective for not preserving and litigating a challenge to the first degree murder verdict on *weight* grounds. (PCRA Appeal Brief at JA360a-61a.) The Superior Court therefore construed the claim as predicated on *weight*. (PCRA Appeal Opinion at SA167-69.) Petitioner even raised *weight* in federal court and recited his state court brief *verbatim*, also acknowledging that weight was the claim raised in state court. (Habeas Petition at SA212-13, SA173.) Even the magistrate described the claim raised in state and federal court as based on "weight." (App. at 70a-78a.) The magistrate's application of sufficiency principles in his "weight" analysis was clear error, of course, as was finding counsel ineffective for not raising a *state law* claim held meritless by the state courts. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The district court, in turn, simply pronounced that the claim raised in state and federal court "sounds a sufficiency tone" and granted the writ based on this different, defaulted claim. (App. at 39a.) The Third Circuit adopted the district court's reasoning, crediting petitioner with

raising sufficiency in all forums despite his repeated assertion of "weight" and the inconsistent nature of the claims. *Rainey*, 603 F.3d at 199-200 (App. at 16a-19a). Several errors underpin this erroneous conclusion.

First and most important, there is no basis for holding that petitioner "merely mislabeled his claim" in state court. *Rainey*, 603 F.3d at 195 n.2 (App. at 7a). His Superior Court brief expressly argued that "the *weight* of the evidence was clearly contrary to the verdict rendered[.]" (Petitioner's PCRA Appeal Brief at JA361a-362a) (emphasis added). He presented his argument as a "weight" claim in both the heading *and* the body of his brief. *See id.* at JA361a (caption "The Verdict Was Against the Weight of the Evidence") (emphasis added; capitalization omitted); *id.* (text arguing that "[t]he *weight* of the evidence is clearly contrary to the verdict") (emphasis added); *id.* ("no challenge has been made by prior counsel as to the *weight* of the evidence") (emphasis added). *See also id.* at JA448a (table of contents); *id.* at JA351a (scope and standard of review); *id.* at JA353a (statement of questions involved); *id.* at JA 356a (summary of the argument). Moreover, the standard he invoked was a *weight* standard, which his brief even differentiated from that governing sufficiency. *See id.* (noting as to review of weight claim that "[t]he evidence need not be viewed in a light most favorable to the verdict winner, and [the court] may evaluate the credibility of witnesses by itself"). Four of the

five cases he cited were *weight* cases, including *Commonwealth v. Vogel*, 461 A.2d 604 (Pa. 1983), a leading decision on weight claims. (*Id.* at JA361a.) His identification of *trial* counsel as ineffective, like his demand for a new trial rather than discharge, confirmed that only weight was fairly presented.[5] For all of these reasons, petitioner did not "merely mislabe[l]" his claim.

Second, the Third Circuit erroneously relied on the presence of references in petitioner's state court filings, and the state courts' opinions, to the evidence presented and the reasonable doubt standard. *Rainey*, 603 F.3d at 199-200 (App. at 38a-41a). But both weight *and* sufficiency address the

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[5]No ineffectiveness overlay would have been necessary for a sufficiency claim because state law does not require such a claim to be presented to the trial court; it may be raised for the first time on appeal. *See* Pa. R. Crim. P. 606, 607 (only weight, as opposed to sufficiency, requires preservation at trial level).

The Third Circuit dismissed this latter consideration as unfairly presuming a *pro se* litigant's knowledge of the "intricacies" of state procedural law. *Rainey*, 603 F.3d at 200 n.3 (App. at 18a n.3). But that assertion is not only inconsistent with habeas law on exhaustion of claims; it is also unworkable, as it requires state courts to ignore every indication that a *pro se* appellant means what he says. It is especially unwarranted in the case of petitioner, a highly sophisticated and active litigant from trial onward. (*E.g.*, Tr. 5/19/95 at 83; Tr. 10/17/95 at 11-21; State Court Docket at SA1, *passim*.)

evidence and the existence of reasonable doubt; sufficiency addresses whether evidence exists, and weight its credibility and relative importance. *Widmer*, 744 A.2d at 751-52. A weight analysis necessarily discusses the same evidence as sufficiency but focuses instead on whether it was properly credited and weighed to find guilt beyond a reasonable doubt. *Id.* It is thus incorrect to assert that the words "evidence," "beyond a reasonable doubt," "overwhelming," or even "sufficient" refer exclusively to sufficiency, as they are common to weight discussions. *See, e.g., Commonwealth v. Hitner*, 910 A.2d 721, 733 (Pa. Super. 2006) (noting "overwhelming evidence" when analyzing weight); *Commonwealth v. McCloskey*, 835 A.2d 801, 809 (Pa. Super. 2003) (same); *Commonwealth v. Rakowski*, 987 A.2d 1215, 1219-20 (Pa. Super. 2010) (noting that "the jury was satisfied that the evidence was sufficient to conclude beyond a reasonable doubt that Appellant was guilty" when finding that weight of evidence "*in toto*" was consistent with verdict).

Finally, the Third Circuit's refashioning of petitioner's claim contravened this Court's precedent. In *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), this Court instructed federal courts to afford *pro se* petitioners liberal construction of their *federal*, not state, filings. *Jones v. Jerrison*, 20 F.3d

849, 855 n.3 (8th Cir. 1994).[6] Even if *Haines* encompassed state filings, liberal construction cannot exceed that afforded by state law. *Haines* certainly does not permit a petitioner to *mislead* the state court into adjudicating one claim, and then later to litigate an entirely different, antithetical one in federal court on the premise that the former exhausted the latter. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (petitioner must alert state court to legal, not just factual, basis for claim); *Picard v. Connor*, 404 U.S. 270, 277 (1971) (petitioner must present "controlling legal principles"). Federal courts cannot even "rewrite" *federal* petitions "to include claims that were never presented," *Parker v. Champion*, 148 F.3d 1219, 1222 (10th Cir. 1998), *cert. denied*, 525 U.S. 1151 (1999), much less state filings. *See also United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) ("liberal construction stops . . . at the point at which we begin to serve as his advocate"), *cert. denied*, 130 S.Ct. 1548 (2010); *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (court may not "conjure allegations" never presented).

Petitioner is especially undeserving of such beneficence, as "the rest of his *pro se* pleadings

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[6] *But see, e.g., Davis v. Silva*, 511 F.3d 1005, 1009-10 & n.4 (9th Cir. 2008); *Lewis v. Sternes*, 390 F.3d 1019, 1027 (7th Cir. 2004). Indeed, this may be the only arguable split of authority in this case, albeit relating to a subsidiary and nondispositive issue.

show him to be a competent writer with a good grasp of the law." *Small v. Endicott*, 998 F.2d 411, 418 (7th Cir. 1993). He has repeatedly proven to be not only a very engaged and high-volume *pro se* litigant, but also extremely knowledgeable. Fair presentation precludes sandbagging of the kind sanctioned by the Third Circuit here.

Petitioner's claim is thus defaulted, and his default may not be excused because he has not shown cause and prejudice or that the lack of federal habeas review would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). As is discussed immediately below, petitioner's sufficiency challenge does not -- and cannot under *Bousley v. United States*, 523 U.S. 614, 623-24 (1998) -- demonstrate his "actual, factual innocence" under *Schlup v. Delo*, 513 U.S. 298 (1995).

2. The State Courts Reasonably Determined that Counsel Did Not Perform Deficiently.

Habeas relief is also unavailable for the independent reason that the state courts reasonably concluded that petitioner's ineffectiveness claim lacked merit because counsel did not perform deficiently. Although the Third Circuit did not reach the deficiency prong of the *Strickland* inquiry or the underlying sufficiency issue, the more than

competent performance by counsel presents another insuperable obstacle to relief.

As an initial matter, petitioner's allegation of deficient performance overlooks the multiple standards operating in the Commonwealth's favor. First, he ignores the federal habeas court's central mandate under 28 U.S.C. § 2254(d). His discussion does not even mention the deferential standard imposed by the AEDPA, despite attaching the statute as an exhibit. Petitioner cannot have it both ways: to the extent he insists that the state courts were fairly presented with and rejected the claim that counsel performed ineffectively for not raising a *sufficiency* claim, rather than a *weight* claim, that determination is entitled to AEDPA deference. *See* Superior Court PCRA Appeal Opinion at SA168-69 (counsel not ineffective for not litigating weight); Superior Court Direct Appeal Opinion at JA340a (describing evidence of guilt as "overwhelming" when rejecting another ineffectiveness claim). The state courts' conclusion that the evidence of petitioner's specific intent to kill was "overwhelming" is the *only* determination that must be accorded deference by this Court under Section 2254(d).[7]

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[7]Petitioner repeatedly asserts that "two federal judges" -- referring to the magistrate judge and the district court judge -- found the evidence insufficient. (Petition at 1, 12.) But whereas their conclusion receives *de novo* review, the contrary determination by *seven* state court judges (the

(continued...)

Second, the petition for *certiorari* review, like the federal district court opinion, fails to recognize the fact that *Jackson v. Virginia*, 443 U.S. 309 (1979), requires that all evidence be viewed in the light most favorable to the Commonwealth and that all reasonable inferences be drawn in its favor. A reviewing court "faced with a record of historical facts that supports *conflicting* inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.* at 326 (emphasis added). As this Court reiterated in *McDaniel v. Brown*, 130 S. Ct. 665 (2009), a habeas court cannot merely cite *Jackson* yet refuse to draw inferences for the prosecution or fixate on "inconsistencies in the testimony." *Id.* at 673.

Third, *Strickland* requires that counsel be presumed effective. *Strickland*, 466 U.S. at 174. *Strickland* imposes an even more onerous burden on prisoners alleging ineffectiveness by appellate counsel. (This is the only claim that may be considered here, due to petitioner's waiver on direct appeal of his claim that trial counsel was ineffective.) Appellate counsel is charged with advancing only the claims with the greatest chance of success,

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[7](...continued)
trial/PCRA judge and two Superior Court panels) is entitled to AEDPA deference.

not every possibly meritorious issue, and is presumed competent in his selection. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

Applying these three deferential standards, the state courts certainly did not act unreasonably for Section 2254(d) purposes in declining to find a constitutional violation in appellate counsel's conclusion that other claims were stronger than sufficiency. This Court has recently, and emphatically, reaffirmed the "doubly" deferential nature of review under *Strickland* and the AEDPA. *Harrington v. Richter*, --- S. Ct. ----, 2011 WL 148587, at *13 (Jan. 19, 2011); *Premo v. Moore*, --- S. Ct. ----, 2011 WL 148253, at *5 (Jan. 19, 2011). Here, where *Jackson* also applies, habeas review is triply so.

The state courts found the evidence "overwhelming," and counsel competent, after applying long-settled Pennsylvania law holding that specific intent to kill may be proven by circumstantial evidence. *Commonwealth v. Williams*, 316 A.2d 888, 891 (Pa. 1974). Specific intent to kill "may be inferred by the jury from facts and circumstances," *Commonwealth v. Carroll*, 194 A.2d 911, 915 (Pa. 1963), because "intent is a subjective frame of mind" and thus "of necessity difficult of direct proof." *Commonwealth v. Matthew*, 909 A.2d 1254, 1257 (Pa. 2006). Indeed, specific intent may be shown, whether on the part of a co-conspirator or accomplice, through inferences from circumstances constituting only third-degree murder on the part

of the principal actor. *Commonwealth v. Schoff*, 911 A.2d 147, 161 (Pa. Super. 2006).

Petitioner's argument, and the district court's finding of insufficiency, relies on the twin misapprehensions that the Commonwealth was required to present *direct* evidence of his specific intent to kill and that every inference must be drawn, as the district court and magistrate opted to do, in *petitioner's* favor. Another erroneous assumption is that the detective's testimony about Riley's oral statements was improperly admitted at trial and could not be considered on sufficiency review. (Report and Recommendation, App. at 77a-78a.) *Compare McDaniel*, 130 S.Ct. at 672 (sufficiency is assessed in light of all evidence admitted at trial, even if improperly admitted); *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988) (same). But even without considering this testimony, the evidence of undisputed admissibility more than proved petitioner's shared intent to kill.

Turning first to the evidence never challenged, the record overwhelmingly established that petitioner planned and oversaw every detail of the robbery-murder. The jury could properly infer from all of this evidence that he intended the killing of Mr. Kang, and that, as the adult whose orchestrations sent Riley into the store with the loaded gun, petitioner was as culpable as the teenaged triggerman, and more so. Petitioner's intent was properly proved indirectly by "the acts and circumstances,"

Carroll, 194 A.2d at 915, because a declaration by petitioner of his intent was not required to establish his subjective frame of mind. *Matthew*, 909 A.2d at 1257. His conduct before, during, and after the robbery-murder more than adequately proved his shared intent to kill.

As to the events before the murder, the jury was entitled to infer that petitioner provided the ammunition and murder weapon to his juvenile co-conspirator, based on the recovery from his home of ammunition matching that used to kill Mr. Kang. (Tr. 5/12/95 at 71-73; Tr. 5/17/95 at 7-13, 30-42, 71-77.) This inference was also supported by the evidence that he bought and supplied the handcuffs used in the robbery, further proving his extensive involvement in the planning and provisioning of the crime. (Tr. 5/16/95 at 10-18, 28-30.) Still more evidence was the testimony by Ms. Kang and bystander Mr. Abdul-Karim that petitioner arrived at the store with Riley, who was armed with the loaded gun. (Tr. 5/15/95 at 46-52, 55, 61-62, 87-88, 94; Tr. 5/12/95 at 112-13, 120-21, 126-27.) *See Commonwealth v. Bronshtein*, 691 A.2d 907, 912-13 (Pa. 1997) (evidence proved specific intent where, *inter alia*, appellant and co-conspirator went to victim's jewelry store together and one of them shot victim twice in the face at close range); *Commonwealth v. Coley*, 504 A.2d 1286, 1289 (Pa. Super. 1986) (specific intent to kill shown by facts including provision of gun used to kill victim); *Commonwealth v. Holbrook*, 629 A.2d 154, 156-57 (Pa.

Super. 1983) (specific intent to kill shown by, *inter alia*, provision of cord used in killing and knowledge of co-felon's capacity for violence).

The evidence of petitioner's cold, purposeful conduct during the murder further established his shared intent to kill. The testimony of Ms. Kang and Mr. Abdul-Karim proved that petitioner immediately assumed a watchful position in the open jewelry store doorway while Riley and Everett entered and began the robbery by threatening the Kangs with the loaded gun. (Tr. 5/15/95 at 46-52, 87-88, 94; Tr. 5/12/95 at 112-13, 120-21, 126-27.) Petitioner's conduct supported the inference that his role was not only as "look-out," but supervisory in nature, and that he was well aware of Riley's possession of the loaded gun and intended its use during the crime. That petitioner's agreement with Riley contemplated fatal violence during the robbery was further supported by the speed of the shooting, occurring "a second" after the robbery began. (Tr. 5/15/95 at 104.). *See Commonwealth v. Rios*, 721 A.2d 1049, 1053-54 (Pa. 1998) (evidence sufficient to establish intent to kill where confederates "worked as a team" during robbery, staked out premises together, and appellant fled with shooter, leaving victim to die); *Holbrook*, 629 A.2d at 157 (specific intent to kill shown by, *inter alia*, fact that appellant knew of violence when it occurred); *Coley*, 504 A.2d at 1289 (presence during killing, with other factors, indicated intent).

Petitioner's conduct immediately after the murder also proved his specific intent to kill. *See Commonwealth v. Bachert*, 453 A.2d 931, 936 (Pa. 1982) ("[T]he absence of direct evidence as to what occurred . . . does not preclude a finding by the jury of culpability in the defendant, *as inferred from his acts and words subsequent to the murder*.") (emphasis added); *Commonwealth v. Waters*, 418 A.2d 312, 318 (Pa. 1980) (intent or common design "may be inferred from the circumstances or acts of the slayer and accomplice committed *shortly after the slaying*") (emphasis added). Right after the shooting, petitioner did not give aid, or even register shock or alarm at the (supposedly unplanned) shooting. He instead closed the door to the store to help his confederates continue the robbery, calmly ignored Mrs. Kang's pleas, and left the victim to die.[8] *See* Tr. 5/15/95 at 47 ("[M]y husband was

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[8]Although the Third Circuit did not reach the question of petitioner's specific intent, the court noted that a testimonial conflict (if greatly lopsided in the Commonwealth's favor) existed as to the timing of the door-closing. *Rainey*, 603 F.3d at 193 (App. at 2a-3a). The circuit court neglected to note, however, that any such conflicts are resolved in the prosecution's favor. *McDaniel*, 130 S. Ct. at 673; *Jackson*, 443 A.2d at 326. The lower federal courts could not infer, as urged by petitioner, that he closed the door before the shooting and was in, or on his way to, the car when it occurred. The jury was entitled to credit Ms. Kang's devastating testimony, when questioned directly on the subject, that petitioner closed the door *after* her husband was

(continued...)

lying on the floor and as the man standing by the door, but the man took the string out and he was closing the door. . . . I was shock[ed] -- for sake of time. See, once the door closes, it locks automatically, so now I was helpless . . . ."); Tr. 5/15/95 at 61 ("I saw a man standing by the door and I had hoped that he would help me that way, but when he was closing the door, pull the string out, remove the string and was closing the door, I was so disappointed I lost my hope and I was shocked for the second time."); *id.* at 87-88 ("my husband was shot first and the door was closed"); *id.* at 94 ("[A]t the time when I saw him for the first time, I was very hopeful. I mean, I thought he was going to help me, but when he closed the door, I was so disappointed"). *See Commonwealth v. Keaton*, 729 A.2d 529, 537 (Pa. 1999) (specific intent to kill found where, *inter alia*, "he left her on the floor, unconscious in the pitch black of the basement, and never returned to check on her"); *Rios*, 721 A.2d at 1053 (same, where "appellant fled with the co-conspirator, leaving Miguel to die while his family stood by with their hands tied, unable to render assistance").

Additional conduct immediately after the murder further confirmed petitioner's shared

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[8](...continued)
shot and lay dying on the floor, rebuffing her plea for help. In any event, this is but one component of several stages of evidence that collectively proved his intent.

intent to kill. First, he fled with his co-conspirators after instructing, "let's go," from the car, thus *twice* electing to deny aid and leave Mr. Kang to die on the floor of the store. (Tr. 5/12/95 at 124-27.) Second, the recovery of the price tag from petitioner's home demonstrated that, rather than recoiling at the supposedly unintended consequence of Mr. Kang's death that he had witnessed at close range, petitioner participated in the distribution of the stolen merchandise. (Tr. 5/15/95 at 62-63; Tr. 5/17/95 at 71-77, 141-43.) *See Bachert*, 453 A.2d at 407 (finding relevant for sufficiency conduct inconsistent by murder participant "who revolted from the act"). Third, he was a fugitive and arrested only after a spectacularly dangerous high-speed car chase. (Tr. 5/17/95 at 82-89, 96-105.) This, like his flight from the store, further evidenced his guilt. *See Commonwealth v. Davis*, 421 A.2d 179, 182 n.4 (Pa. 1980) (flight showed consciousness of guilt further sustaining first degree murder); *Commonwealth v. Pestinikas*, 617 A.2d 1339, 1347-48 (Pa. Super. 1992) (*en banc*) (same, as to attempt "to conceal his whereabouts, . . . or to otherwise engage in conduct designed to avoid apprehension or prosecution").

Finally, Nathan Riley's written confession and testimony suggested that the crime had one

mastermind before, during, and after the murder.[9] The jury was entitled to resolve conflicting testimony about the identity of this mastermind, and to conclude from all of the evidence presented that this individual was petitioner. *McDaniel*, 130 S. Ct. at 673; *Jackson*, 443 U.S. at 326. Petitioner has consistently suggested that it is somehow grossly improper to consider this evidence, yet there is no hint of error under *Bruton v. United States*, 391 U.S. 123 (1968). Riley's statement and testimony were both substantively admissible against all of his confederates, including petitioner. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

Turning to the disputed evidence, the detective's testimony regarding Riley's oral statements was ultimately cumulative because it merely

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[9] *See* Tr. 5/17/95 at 121-25 (written statement describing mastermind role to "dude" later identified as Wallace, *i.e.*, as recruiting Riley, giving him the gun, deciding when the robbery would begin, closing the door behind Riley and Everett, instructing them to get into the car after the robbery-murder, selling the jewelry, and distributing the proceeds); Tr. 5/18/95 at 76-78, 142 (admitting that in prior written statement he had falsely attributed planning role and threats to co-defendant Wallace, but then claiming it was Everett who did those things); *id.* at 135-37 (ascribing to Everett door-closing, ascribed by other witnesses to petitioner); *id.* at 13-18 76-78, 120, 137 (Riley testimony that mastermind, now identified as Everett, recruited him, accompanied him to store, said "go in there now," and threatened Riley not to identify him).

confirmed that petitioner -- not Wallace or Everett -- was the mastermind who "decided what was going to happen and where" and gave Riley the gun. (Tr. 5/19/95 at 58.) The teenager admitted to the detective what was amply proven by other evidence: that petitioner recruited the participants, armed Riley with the gun, bought the handcuffs (accompanied by Riley) and supplied them to Everett, walked up to the Kangs' store with Riley and Everett, closed the door behind them, instructed them to abandon the store (and victim) by saying "let's go" from the get-away car, sold the stolen jewelry, and distributed the proceeds. (*Id.* at 58-60, 65, 69-74.) Only on direct appeal did the Superior Court limit this evidence to impeachment purposes. It therefore must be considered on sufficiency review. *McDaniel*, 130 S. Ct. at 672; *Lockhart*, 488 U.S. at 40-42. But the distinction between "impeachment" and "substantive" evidence is so fine as to be meaningless in this instance, where the "impeachment" was of Riley's attempts to assign the mastermind role to Wallace or Everett rather than petitioner, and where his attempts to inculpate certain co-conspirators and not others were closely intertwined with his efforts to diminish his own culpability. Because Riley's own testimony was subject to cross-examination and thus substantively admissible against all defendants, impeachment of those statements was thus necessarily substantive evidence against petitioner. Accordingly, there is no basis for his repeated suggestions that his trial was tainted by

confrontation error, whether under *Bruton* based on Riley's written statement and testimony or through supposedly improper hearsay in the detective's testimony.

In finding the evidence of petitioner's shared intent to kill inadequate on weight and sufficiency grounds, respectively, the magistrate's report and district court's opinion consider only some, not all of the foregoing evidence. (Report and Recommendation, App. at 76a-78a; District Court Opinion at 40a-42a.) Moreover, both decisions consider the evidence in isolation to determine whether individual items are by themselves sufficient to establish specific intent to kill, whereas sufficiency requires consideration of the record in its totality. *McDaniel*, 130 S. Ct. at 669. Both decisions further reflect a marked disclination to draw any inferences the Commonwealth's favor. Neither the magistrate's report nor the district court opinion reflect the "doubly" deferential stance toward the Superior Court opinion that is required by the AEDPA and *Strickland* -- much less the triple deference to the verdicts required under *Jackson*.

Viewing the evidence in its totality and drawing all reasonable inferences in the Commonwealth's favor, it was not arbitrary of the state courts to hold that sufficient evidence established petitioner's shared intent to kill. The jury was not obligated to ignore the record and conclude that he *did not* send 15-year old Riley into the store with a

loaded gun or that he did so *without* intending the murder. Accordingly, appellate counsel was not deficient in deciding to pursue claims other than sufficiency on behalf of petitioner, who was clearly the ringleader and most purposeful and culpable participant in this robbery- murder. *Jones*, 463 U.S. at 751-52. It certainly cannot be said that the Superior Court's conclusion that counsel did not perform deficiently is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington*, --- S.Ct. ----, 2011 WL 148587, at *12.

B. Review Is Also Unwarranted Because the Decision Below Was Correct Under the Circumstances and Is of Limited Significance.

Petitioner's application for review seeks to generate interest in his case by mischaracterizing the Third Circuit's holding and manufacturing a "circuit split." Rather, the circuit court's decision is clearly limited to the specific, unusual facts of this case as governed by the atypical structure of Pennsylvania's murder statutes. And despite petitioner's contrary assertions, the Third Circuit's decision is consistent with this Court's precedent and the only relevant circuit court authority located by the parties. There is simply no "split" of authority other than in petitioner's imagination. There is no cause for this Court's review of a proper

decision on an issue that appears *never* to have been squarely addressed by another circuit court and could at most affect a tiny number of criminal defendants.

1. Petitioner Mischaracterizes the Third Circuit's Decision.

Petitioner starts by grossly overstating the Third Circuit's holding. According to his petition for review, the decision "defines 'prejudice' under *Strickland* as meaning that counsel's deficient performance must result in a longer or harder sentence." (Petition at i.) *See also id.* at 8 (asserting that Third Circuit's decision "adds a requirement nowhere to be found in *Strickland*: that no matter when counsel's assistance is deficient or what other prejudice it might cause, the petitioner must also demonstrate that it caused him to receive a more onerous sentence"). Of course, the Third Circuit held nothing of the kind. The court certainly did not purport to redefine prejudice globally by "add-[ing] a requirement" of a "more onerous" sentence for *all* petitioners alleging guilt-phase ineffectiveness. The circuit court merely found that the extraordinary remedy of the writ (*i.e.*, release from detention) was inappropriate in this particular case, where petitioner's proven guilt of second degree murder would require his continued detention in any event under Pennsylvania's unusual statutory scheme.

There might conceivably be a case where a defendant suffers cognizable *Strickland* prejudice other than a harsher sentence. This defendant, however, has been unable to identify any such prejudice in his case. He complains that he had to "face" the "prospect" of a death sentence. But that prospect is now moot. He was, in effect, acquitted of the death penalty by operation of Pennsylvania law (which mandates the imposition of a life sentence where the jury cannot reach agreement between life and death, 42 Pa. C.S. § 9711(c)(1)(v)). He is no more entitled to habeas relief on the basis of this acquittal than he would be on the basis of any other acquittal.

Beyond, that, all petitioner can say in various ways is that his conviction was "unconstitutional" because it was given the wrong name -- first degree murder rather than second degree. Had petitioner's counsel for some reason chosen to raise his pointless sufficiency claim in state court, however, the court could simply have exercised its power to reform the verdict by reducing the degree of the offense in question. *See, e.g., Commonwealth v. Alexander*, 383 A.2d 887, 890 (Pa. 1978); *Commonwealth v. Sterling*, 170 A. 258, 259 (Pa. 1934); *see generally* 42 Pa. C.S. § 706; *accord Rutledge v. United States*, 517 U.S. 292, 306 (1996); *Jones v. Thomas*, 491 U.S. 376, 387 (1989); *Morris v. Matthews*, 475 U.S. 237, 246-47 (1986). Petitioner utterly fails to explain why he was prejudiced by his lawyer's failure to seek such hollow relief.

2. No "Circuit Split" Exists on this Virtually Unlitigated Issue.

Nor is there a "circuit split" on the issue presented, much less one that the Third Circuit's decision "widens." (Petition at 5, 8-11.) Petitioner has instead created one through his own recasting (or redrafting) of the opinion.

After inflating the Third Circuit's holding beyond recognition, petitioner next seeks to catastrophize it. But he does so by citing supposedly contrary authority from the Courts of Appeals for the Second, Sixth, Seventh, and Ninth Circuits that, on their face, are not even remotely on point. (Petition at 9-10) (*citing Wilson v. Mazzuca*, 570 F.3d 490 (2d Cir. 2009); *Brown v. Smith*, 551 F.3d 424 (6th Cir. 2008); *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988); *Luna v. Cambra*, 306 F.3d 954 (9th Cir. 2002)). The generalized language he quotes from these decisions alone makes clear that they have no bearing on whether he has demonstrated a constitutional violation in this case to the satisfaction of AEDPA, *Strickland*, and *Jackson*. *See Wilson*, 570 F.3d at 507 (where petitioner already served sentence, granting relief based on guilt phase errors causing prejudice because "[o]ur confidence in the jury's verdict is critically undermined"); *Brown*, 551 F.3d at 435 ("Given the nature of this missing evidence, its absence was an error sufficient -- where there was no other evidence of Brown's guilt -- to undermine our confidence in the

outcome of his trial"); *Montgomery*, 846 F.2d at 416 ("In order to demonstrate prejudice, the petitioner need only establish a reasonable probability that the Sears witness's testimony would have changed the jury's verdict") (emphasis omitted); *Luna*, 306 F.3d at 966 (had evidence been presented, "there is a reasonable probability that the jury would have returned a different verdict" such that "our confidence in its guilty verdict has been undermined"). None of these decisions addresses the situation here, where a petitioner convicted of first degree murder has challenged only the sufficiency of his specific intent to kill, but not the evidence proving his guilt of felony murder, and where both crimes carry the same automatic life sentence.

Petitioner's reliance on such inapposite authority effectively concedes his inability to identify *any* case more relevant than *Clark v. Maggio*, *supra*. As noted above, that pre-AEDPA decision held that insufficient evidence of specific intent did not justify the writ because Clark would remain subject to a life sentence for felony murder. *Clark*, 737 F.2d at 475-76. Here, relief is even less appropriate given the additional layers of deferential review required under the AEDPA and *Strickland*.

Of course, the reason for petitioner's failure to identify on-point authority is the unusual nature of Pennsylvania's murder statutes, which define second degree murder as a crime separate from non-capital intentional, premeditated homicide but

mandate the identical punishment of life imprisonment.[10] Apparently, few if any states appear to have a comparable statutory scheme. The closest appears to be Louisiana. So it is not surprising that the Fifth Circuit's decision in *Clark* (arising from a Louisiana conviction) is the only other circuit court precedent addressing the taxonomy that makes petitioner's claim even possible. His bid for relief, and this Court's review, therefore hinges on a fortuity of legislative historical development that makes the number of potentially similarly situated prisoners exceedingly few in number, and the issue virtually unlitigated as a result. The asserted "circuit split" is thus wholly of his own devising. *Certiorari* is inappropriate absent any potential for significant litigation of the issue, much less disagreement among the circuits.

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[10]Indeed under prior Pennsylvania law, felony murder and specific intent murder were explicitly classified as alternative forms of first degree murder. When the offenses were reclassified under the current Pennsylvania Crimes Code, the only change was to rename them as first degree and second degree murder, both of which carry a mandatory sentence of life imprisonment. The death penalty is available for first degree murder but, as noted above, was not imposed here.

3. The Third Circuit's Decision Was Proper Under the Circumstances and Has Very Limited Significance Due to the Unusual Facts and Statutory Provisions Involved.

Nor, finally, was it unjust for the Third Circuit to deny the writ under the unusual circumstances of this case. Petitioner's claim for relief is grounded entirely on the nomenclature that the Pennsylvania legislature has assigned to noncapital first degree murder and felony, or "second degree" murder, rather than a difference in punishment creating a substantive distinction between the crimes in his case. But even if the Third Circuit's decision were erroneous, its impact is remarkably limited in nature, evident in petitioner's failure to identify a single circuit court case other than *Clark* involving a prisoner in his situation.

Habeas relief is not available for all constitutional errors. The writ is instead awarded only to "[t]hose few . . . whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay v. Noia*, 372 U.S. 391, 440-41 (1963). *Accord Jackson*, 443 U.S. at 332 n.5 (Stevens, J., concurring) (habeas "is designed to guard against extreme malfunctions in the state criminal justice systems"). *See also Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993) ("To set aside

a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him"); *Jones*, 491 U.S. at 387 ("neither the Double Jeopardy Clause nor any other constitutional provision exists to provide unjustified windfalls").

The narrow habeas inquiry centers upon "the constitutionality of the applicant's detention," as "[t]he primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned." *Townsend v. Sain*, 372 U.S. 293, 317 (1963) (internal quotations and citation omitted). Indeed, the sole justification for the exercise of federal habeas jurisdiction on behalf of a state prisoner is his or her detention. *See* 28 U.S.C. § 2254(a) (habeas applicant must be "person in custody pursuant to the judgment of a State court"); *Fay*, 372 U.S. at 430 (Justice Brennan emphasizing that "[t]he jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*"). Accordingly, review and relief have been denied in the absence of a practical impact upon a petitioner's detention that would justify federal intrusion into state criminal proceedings. *See, e.g.*, *Barnes v. United States*, 412 U.S. 837, 848 n.16 (1973) (declining as discretionary matter to review four counts carrying concurrent sentences); *Jones v. Zimmerman*, 805 F.2d 1125, 1128 (3rd Cir. 1986) (explaining that concurrent sentence doctrine holds that "because the defendant remains sentenced in

any event, reviewing the concurrently sentenced counts is of no utility" and that doctrine "is eminently practical and preserves judicial resources for more pressing needs").

Applying these principles here, the Third Circuit concluded that petitioner would, as a practical matter, remain subject under 18 Pa.C.S. § 1102(b) to lifelong incarceration pursuant to the jury's adjudication of his guilt on all elements comprising second degree murder. The circuit court therefore declined to put into motion the machinery of habeas in this case, insofar as it would merely result in the formalistic exercise of remand to the state courts for reformation of the verdict and his continued detention. Petitioner puzzlingly posits some sort of double jeopardy problem, but no one, neither he nor the Commonwealth, was ever arguing for a retrial on the basis of his sufficiency claim. Had the evidence been insufficient to prove specific intent to kill, the remedy would have been to reduce the degree of the verdict from first to second degree.

Petitioner otherwise identifies no continuing collateral consequences to himself from his incarceration on the first degree murder verdict. (Petition at 12.) He instead attempts to analogize this case to others by postulating other crimes in an imagined jurisdiction. (*Id.* at 8.) Such pretend petitioners are, by definition, in materially

different situations from his own very uncommon position.

Petitioner's resort to the hypothetical realm also underscores the extremely limited reach of the Third Circuit's decision beyond Pennsylvania and Louisiana. Again, he is unable to point to a *single* circuit court decision addressing the circumstances presented here under AEDPA, *Jackson*, and *Strickland*. The unusual nature of this statutory scheme, coupled with this even more uncommon factual and procedural posture, ensures that cases like petitioner's will continue to be few and far between.

In sum, petitioner is exceptionally undeserving of habeas relief for many reasons, and the combination of circumstances in his case is exceptionally rare. Even if the Third Circuit's decision were in error, this Court is not an error-correcting tribunal, and the negligible impact of the decision makes it unsuitable for review.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the Petition for Writ of Certiorari.

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